LAWFOYER INTERNATIONAL JOURNAL OF DOCTRINAL LEGAL RESEARCH

(ISSN: 2583-7753)

Volume 1 | Issue 3

2023

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EXAMINING THE AGE OF CONSENT: A CRITICAL ANALYSIS OF THE POCSO ACT

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I. ABSTARCT

In 2012, India introduced the 'Protection of Children from Sexual Offences (POCSO) Act,' a pivotal legal instrument aimed at combating child sexual abuse and safeguarding the well-being of children throughout the legal process. Notably, the Act raised the age of consent for sexual activity to eighteen, in alignment with revised rape legislation. This paper re-evaluates historical debates on the age of consent in late nineteenth-century India and examines their contemporary relevance. The study delves into the challenges faced by today's teenagers, navigating a world saturated with easily accessible sexual information and grappling with natural curiosity and physical urges. The article deals with the implications of criminalizing consensual sexual activity within the framework of fundamental human rights principles. Furthermore, the article explores international legal frameworks related to the age of consent, while offering prudent amendments for the Indian legal system. This paper sheds light on the profound impact of the age of consent in India, underscores the necessity for thoughtful legal revisions, and addresses the ever-evolving landscape of adolescent sexual experiences in the modern era.

II. KEYWORDS

Age of Consent, POCSO Act, Minor Rape, Criminal Law Amendment Act, 2013, sexual activity.

III. INTRODUCTION

In the pivotal year of 2012, India's legal tapestry underwent a dramatic transformation, casting ripples that reached deep into the realm of adolescent romance, forever altering their experiences and aspirations. Though delving into the intricacies of romantic relationships and engaging in intimate experiences with a partner is an inherent facet of adolescent growth and maturation. In India, the landscape of adolescent romantic bonds is profoundly influenced by

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the intricate interplay of multifaceted sociocultural dynamics. In 2012, India introduced a transformative legal framework aimed at addressing child sexual abuse, which led to significant amendments in 2013 to the country's rape laws. The 'Protection of Children from Sexual Offences (POCSO) Act, 2012,' had been made with the primary goal of protecting children from the heinous crimes such as sexual assault, harassment, and pornography-related offenses. However, a significant alteration accompanying these legal changes was the elevation of the age at which consent for sexual activity is granted, moving it from 16 to 18 years. This adjustment was interconnected with the amendments made to rape laws. This paper sets out on an expedition to examine the historical discussions pertaining to the age of consent recognised by law in India and its consequences for the criminalization of consensual sexual activity among adolescents. The research delves into international legal frameworks surrounding the age of consent, considers the perspectives of various High Courts and committees tasked with reviewing this age, and highlights the urgent necessity for prudent amendments within the Indian legal framework. The aim is to illuminate the intricate and evolving landscape and its impact on adolescent relationships in India.

IV. PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 AND CRIMINAL LAW AMENDMENT ACT, 2013

Before 2012, there was no specific law that exclusively dealt with the issue of child sexual abuse. India, having ratified United Nation Convention on the Rights of Child in 1992 and owing to the increased cases of sexual harassment of children, The Protection of Children from Sexual Offences (POCSO) Act, 2012 was brought into the statute books, marking the introduction of a thorough and progressive definition of child sexual assault within the nation's legal framework for the first time. This legislation encompasses various forms of penetrative and non-penetrative sexual assaults and outlines corresponding legal penalties. POCSO has received widespread recognition for addressing the legislative gap regarding sexual assault against children, including boys and transgender individuals under the age of 18. Shortly following the introduction of the POCSO Act, in 2013, revisions were introduced to particular sections of the Indian Penal Code (IPC), specifically Sections 375 (which defines rape), 376 (which prescribes punishments for rape), and 354 (which offers definitions and penalties for sexual harassment). These changes were prompted by a widely reported gang rape case that took place in New Delhi in 2012. The Criminal Law Amendment Act of 2013, which incorporates the amendments to rape legislation, broadened the definition of rape. It expanded

from being a crime restricted to non-consensual peno-vaginal penetration to encompass a more comprehensive spectrum of both penetrative and non-penetrative sexual offenses committed without consent. This expanded interpretation encompasses actions like penetration of the vagina, anus, and urethra through the use of the penis, objects, or other body parts, in addition to oral contact with the vagina, urethra, or anus without the individual's consent[2]. Although the POCSO Act of 2012 and the Criminal Law Amendment Act of 2013 are separate pieces of criminal legislation, they are employed together in instances of all types of sexual offenses against girls below the age of eighteen years.

V. AGE OF CONSENT IN INDIA PRIOR TO POCSO ACT

The age of consent refers to the legally recognized age at which an individual can give consent for marriage or engage in sexual activities.[3] This age is determined by law, and currently, it stands at 18 years due to the POCSO Act. Prior to the implementation of the POCSO Act, the idea of the age of consent lacked clarity and was determined by Section 375 of the IPC, which pertains to the offense of rape. Because rape was legally defined as a crime targeted at women, the concept of the age of consent exclusively pertained to females. Below a particular age, consent was deemed inconsequential, and any sexual activity was categorized as statutory rape. Interestingly, there was no designated age of consent for males. Moreover, neither the IPC nor the General Clauses Act of 1897 provided a clear definition of the term child[4].

The age of consent for females, as stipulated in Section 375 of the IPC, which deals with "rape," has undergone a series of modifications throughout its history. Initially set at 10 years in 1860, it was subsequently increased to 12 years in 1891 in response to public outcry triggered by the *Phulmoni* case[5]. Following this, it was raised to 14 years in 1925 and subsequently to 16 years in 1940. Up until the introduction of the POCSO Act in 2012, the age of consent for females stayed at 16 years, and there was no designated age of consent for males[6]. However, the minimum age for marriage was set at 18 years for women and 21 years for men. The exception

[2] Criminal Law Amendment Act, 2013.
[3] *Black's Law Dictionary* (9th edn,2022), pg.70.
[4] Law Commission, *283 Report on Age of Consent under Protection of Children from Sexual Offences Act, 2012* (Law Com No 283, 2023) para 6.1
[5] *Queen-Empress v. Hurree Mohun Mythee*, [1891] ILR l8 Cal 49
[6] Law Commission, *283 Report on Age of Consent under Protection of Children from Sexual Offences Act, 2012* (Law Com No 283, 2023) para 6.3

related to marital rape within Section 375 has also undergone changes, starting at 10 years in 1860 and reaching 15 years by 2012[7].

Time-Period	Age of Consent
1860-1891	10
1891-1925	12
1925-1940	14
1940-2012	16
2012-till date	18

VI. IMPACT OF INCREASING THE AGE

The increase in the age of consent has led to a surge in cases involving romantic relationships, which has placed a significant strain on the criminal justice system. The National Crime Records Bureau (NCRB) is a governmental organization in India tasked with the collection and examination of crime statistics as per the Indian Penal Code (IPC) and Special and Local Laws (SLL). The 2021 Crime in India Report, released by the NCRB, discloses a compelling pattern in instances subject to the POCSO Act. The majority of victims in these cases are in the age bracket of 16 to 18 years, with a notable percentage of them being females. Nevertheless, when we direct our attention to juveniles who are arrested under the provisions of the POCSO Act, a distinct trend becomes apparent, with a greater number of male individuals facing charges in such cases[8]. As per the NCRB report for 2021, the data spanning from 2019 to 2021 reveals that among child victims falling within the 16-18 age range under the provisions of the POCSO Act, there were 69 boys and 16,206 girls[9]. During the same timeframe, when examining juveniles who were taken into custody under the POCSO Act, there were approximately 1,720 boys in the 16-18 age group, whereas only 5 girls fell into the same category[10].

These observations underscore the complex dynamics within cases regulated by the POCSO Act, where the age group and gender of victims and detained juveniles can exhibit significant variations. Due to the considerable number of POCSO cases being registered, Special Courts

[7] Law Commission, *283 Report on Age of Consent under Protection of Children from Sexual Offences Act, 2012* (Law Com No 283, 2023) para 6.3
[8] National Crime Records Bureau, *Crime in India 2021* (NCRB 2022) vol 1 table 44.9, 370-71
[9] National Crime Records Bureau, *Crime in India 2021* (NCRB 2022) vol 1 table 44.9, 370-71
[10] Ibid 7, table 5A.4, 448.

encounter challenges in promptly recording the statements of children and expediting the trials to meet the prescribed timeframes set by the POCSO Act[11].

VII. ADOLESCENT'S RIGHT TO LIFE AT STAKE

During the phase of adolescence marked by exploration and experimentation, there is a natural desire for increased independence from family and educational structures. One common aspect of this exploration is the expression of interest in establishing romantic relationships, considered a typical developmental pathway. Interestingly, a significant number of adolescents between the ages of 13 and 19 have reported experiencing some level of sexual intimacy with their romantic partners[12]. Yet, from a legal standpoint, such sexual engagement is considered to diverge from societal conventions.

Since individuals below the age of 18 are not legally recognized as adults capable of providing consent, they inevitably come under the jurisdiction of the POCSO Act. The formation of romantic relationships is not restricted by gender and necessitates mutual consent from both partners[13]. However, the gender-neutral principle established by the act is often overlooked. In numerous instances, whether a boy is below 18 or above 18, legal proceedings are typically initiated against him, whereas girls are usually seen as the recipients of harm.[14] Moreover, in cases where grooming is employed as a tactic, evaluating the psychological manipulation exerted by the perpetrator on the target can be intricate, particularly when the perpetrator holds a position of trust.[15, 16]

"Doli incapax" pertains to the incapacity of a child to form criminal intent when committing a crime. Children under 7 years old fall into the "Doli Incapax" category, and those between 7 and 12 years of age are absolved from criminal liability if it can be proven that they are unable

[11] The Protection of Children from Sexual Offences Act 2012, s. 35.
[12] Sodhi G, Verma M, and Pelto P. 'Seeking gratification: a study of sexual behaviour patterns of adolescents in an urban slum.' in: Koenig MA (ed) *Reproductive Health in India: New Evidence*. (Jaipur, India: Rawat Publications, 2008, 303–322).
[13] Mantri G. 'POCSO criminalizing teen sexuality? NCRB data suggests that may be true.' *The News Minute* (Bengaluru, 2019).
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[16] Whittle HC, Hamilton-Giachritsis C, and Beech AR. 'Victims' voices: the impact of online grooming and sexual abuse' (2013) Univers J Psychol, 59–71.

to develop criminal intent for specific reasons[17]. Although anyone below 18 years is legally classified as a 'Juvenile[18]' according to Section 2(35) of the Juvenile Justice Act, 2015, the legal approach differs based on their age. If a juvenile is below 16 years and engages in criminal activities, actions are taken in accordance with Section 18 of the Act. For juveniles aged 16 to 18, a preliminary assessment by the Board is conducted to determine if they can be treated as adults, particularly when they've committed serious offenses and demonstrate the capacity to understand the consequences of their actions. This evaluation is only applicable to juveniles aged 16-18 and under specific circumstances, such as the commission of severe crimes. Consequently, under the Juvenile Act, in certain cases where the accused is deemed capable of comprehending the repercussions of their actions, they are treated as adults[19]. Consequently, the issue of setting the age of consent for sexual offenses, particularly whether it should be raised above 18 years, remains a highly debated topic across the country.

VIII. JUSTICE VERMA COMMITTEE REPORT

In its Report, the Justice J.S. Verma Committee suggested bringing the age of consent in the POCSO Act in line with Section 375 of the IPC, which initially established it at 16 years prior to the 2013 Criminal Law Amendment Act. They proposed an alteration to the sixth clause of Section 375 to make it explicit that consent cannot be given when a person is unable to communicate it, either in a clear or implied manner[20]. According to the report, the primary objective of The Convention on the Rights of the Child was to safeguard children from sexual assault and exploitation, rather than treating consensual sexual activity among those under eighteen as a criminal act. The Committee recommends reducing the age of consent to sixteen, accompanied by essential modifications to the Protection of Children from Sexual Offences Act, 2012, to bring it in harmony with the Indian Penal Code and prevent discrepancies[21].

IX. VIEWS OF VARIOUS HIGH COURTS

[17] Jacob, N. (2019)' Doli incapax' (2019), Law Times Journal https://lawtimesjournal.in/doli-incapax/ (Accessed: 20 October 2023).
[18] Juvenile Justice Act 2015, s. 2(35).
[19] Juvenile Justice Act 2015.
[20] Justice Verma Committee, *Justice J. S. Verma Committee Recommendations and Criminal Law (Amendment) Act, 2013* (January 23,2013) 443 & 444.
[21] Justice Verma Committee, *Justice J. S. Verma Committee Recommendations and Criminal Law (Amendment) Act, 2013* (January 23,2013) 443 & 444.

High Courts have recognized the need to reconsider the "age of consent." In the *Sabari v. State of Tamil Nadu*[22] case, the Madras High Court acquitted a defendant in a case involving a seventeen-year-old girl who did not support the prosecution. The court observed that such cases could subject the boy to the severe penalties of the POCSO Act, which could lead to 7 to 10 years of imprisonment. The court suggested that Section 2(d) of the POCSO Act, defining a "Child" should be redefined as 16 instead of 18, taking into account the practical realities.

Likewise, in the *Atul Mishra v. State of UP*[23] case, the Allahabad High Court granted bail to the accused in an elopement case where the couple had a child from their marriage. The court emphasized that applying statutory provisions should not be a rigid mathematical exercise but should consider the overall outcome in specific circumstances. The court stressed the responsibility of the courts to moderate the strictness of the law when its application could result in severe and unjust consequences.

In the *Ajay Kumar v. State (NCT of Delhi*)[24] case wherein the boy engaged in consensual sexual relationship with a girl, the Delhi High Court clarified that the primary purpose of the POCSO Act was to safeguard children under 18 from sexual exploitation, and it was not intended to criminalize consensual romantic relationships among young adults.

X. AGE OF CONSENT IN OTHER COUNTRIES

Canada: Despite the fact that the legal age of consent in Canada is 16 years, the law continues to provide protection against the sexual exploitation of "young persons" by those in positions of trust or authority, individuals with whom they have dependent associations, or those involved in exploitative relationships. In *Criminal Code of Canada*, "young persons" refers to individuals aged 16 or older but below 18 years[25].

Australia: In Australia, the age at which consent is legally recognized varies, typically falling within the range of 16 to 17 years, depending on the specific State or territory[26]. Additionally, in most States, engaging in sexual activity by an individual in a supervisory position with someone aged 16 or 17 years under their special care is considered a criminal offense.

[22] *Sabari v. State of Tamil Nadu* [2019] SCC OnLine Mad 18850
[23] *Atul Mishra v. State of UP* [2022] SCC OnLine All 420
[24] *Ajay Kumar v. State (NCT of Delhi*),BAIL APPLN. 3177/2022 & CRL.M.(BAIL) 1306/2022 (Interim Bail)
[25] Criminal Code of Canada, s.153
[26] Age of consent (nd) Victoria Legal Aid. Available at: https://www.legalaid.vic.gov.au/age-consent (Accessed: 25 October 2023)

America: In the United States, the age at which individuals are legally able to give consent varies from one state to another[27]. As per the *United States Code,* at the federal level, the age of consent is consistently set at 18 years[28]. However, in many states, apart from specifying a particular age of consent, there exists an additional requirement related to a minimum age. The legality of engaging in sexual intercourse with someone who is older than the minimum age but younger than the age of consent depends on factors like the age difference between the individuals involved and/or the age of the person facing accusations in the offense.

Other Countries: As far as other countries are concerned, the age of consent in China is 14, in Denmark it is 15, in France is 15, in Malaysia it is 16, in Russia it is 16[29].

Countries	**Age of Consent**
Canada	16
Australia	16-17
America	18
China	14
Denmark	15
France	15
Malaysia	16
Russia	16

283rd Law Commission Report: After a comprehensive review of the current child protection laws, analysis of legal precedents, and considering the urgent concerns related to child abuse, child trafficking, and child prostitution in the society, the Commission has determined that changing the existing age of consent as outlined in the POCSO Act is not recommended**.** Nonetheless, the Commission has acknowledged the necessity for specific revisions to the POCSO Act to tackle circumstances in which individuals between the ages of 16 and 18 may provide an implied agreement in practice, rather than a legally recognized consent[30]. In such instances, the Commission holds the view that these cases should not be subject to the same strict measures as initially intended in the POCSO Act. Consequently, the Commission has

[27] United states Code, sec. 2251
[28] United states Code, sec. 2251
[29] Age of Consent 'Legal ages of consent by country, Age of Consent Laws By Country' https://www.ageofconsent.net/world (Accessed: 20 October 2023).
[30] Law Commission, *283 Report on Age of Consent under Protection of Children from Sexual Offences Act, 2012* (Law Com No 283, 2023).

introduced a system of supervised judicial flexibility in determining the sentences for such cases, with an emphasis on maintaining a well-balanced approach that places the child's best interests at the forefront.[31] Further, the Commission has recommended that the following proviso and explanation be added to Section l8 of the Juvenile Justice (Care and Protection of Children) Act, 2015:

"Provided that where a child in conflict with law is found to have committed any sexual offence under the Protection of Children from Sexual Offences Act, 2012 [Act 32 of 20l2] or any other law for the time being in force against a child aged sixteen or above, having regard to the facts and circumstances of the particular case, if the Juvenile Justice Board or the Special Court, as the case may be, is satisfied that there exist special and adequate reasons, to be recorded in writing, it may pass any appropriate dispositional order under this section[32]".

XI. WAY-AHEAD

The blanket criminalization of consensual sexual activities among adolescents not only overlooks their sexual development and autonomy but also violates their fundamental rights. To rectify this situation, the implementation of comprehensive sexuality education is imperative. This education equips adolescents with the knowledge, skills, and attitudes needed to make informed decisions and uphold their health and dignity[33]. Furthermore, a crucial step forward involves amending the POCSO Act and the Indian Penal Code to decriminalize consensual activities among adolescents aged 16 and above[34]. This amendment will achieve a harmonious equilibrium between individual autonomy and safeguarding, guaranteeing the protection of individuals aged 16 to 18 from acts lacking their consent. Through these measures, society can more effectively honour and uphold the rights and welfare of its teenage population.

XII. CONCLUSION

[31] Law Commission, *283 Report on Age of Consent under Protection of Children from Sexual Offences Act, 2012* (Law Com No 283, 2023).
[32] Law Commission, *283 Report on Age of Consent under Protection of Children from Sexual Offences Act, 2012* (Law Com No 283, 2023) 130
[33] Swagata Raha, 'Criminalising consensual relationships' (*The Hindu*, 20 December, 2022) https://www.thehindu.com/opinion/op-ed/criminalising-consensual-relationships/article66281782.ece accessed 6 November 2023
[34] Justice Verma Committee, *Justice J. S. Verma Committee Recommendations and Criminal Law (Amendment) Act, 2013* (January 23,2013) 443 & 444.

Exploring the facets of romantic relationships and engaging in intimate acts with a partner is an inherent aspect of adolescent development. However, in India, the landscape of adolescent romantic relationships is intricately shaped by a complex interplay of sociocultural factors. Even within the legal framework, specifically delineated in the POCSO Act of 2012, the notion of consent becomes a delicate balance between addressing the age-appropriate developmental needs of children and fulfilling legal obligations. In light of the Justice Verma Committee Report, the Parliament should contemplate a potential adjustment in the age of consent from eighteen to sixteen years. This adjustment aims to refocus the legal system on the protection of children from sexual harassment while avoiding the criminalization of consensual sexual activities among them. Addressing this matter promptly is imperative to ensure the well-being of children, protect them from any form of sexual exploitation, and foster their positive growth and development in accordance with the Act's guiding principles.

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